CHAN FOO KEONG & ANOR.

v.

NILAI CHEMPAKA SDN. BHD. & ANOR

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22 - 470 -1993]
30 JUNE 1993

INJUNCTION: Setting aside - Whether there was material non-disclosure - Whether Court should have been informed of decision in a connected suit decided in another court - Consideration of merits of the case where the non-disclosure is not material.

The application before the Court was to set aside the injunction granted by the Court on 11 May 1993 against the first defendants (D1) and their officers, servants/agents (D2) from making any payment, signing cheques or in any other way dealing with any monies, assets or properties of D1 and carrying out D1's duties, functions and responsibilities.

Defendants' counsel claimed there had been material non-disclosure by P in obtaining the injunction in that P had obtained an injunction against D1 in another court (Civil Suit 22-316-93) which had been set aside on 28 April 1993 and that the 2 suits were connected to one another.

The other suit was regards a joint venture agreement between P and D1 of this action for timber logging. The suit here relates to the internal dispute on the financial management and administrative running of D1. Thus the joint venture agreement becomes pertinent in this action as well.

Defendants' counsel emphasised that had this court been aware of the other order, it would not have granted the application for an injunction in this matter as this had the effect of making the other order unworkable.The other Court had ordered D1 to give a submission of accounts of the timber felled when setting aside P's injunction in the other suit.

Held:

[1] The relevant affidavits show that P had in fact averred on the joint venture agreement, which is the subject-matter of the other suit, in their affidavit supporting their application for the injunction here. They had however failed to disclose the decision in that case.

[2] The question to be asked here is this - if P had stated the fact of the decision in the other suit on 28 April 1993 to this court, would this court have still granted the order on 11 May 1993. The answer is that the non-disclosure was not a material one as the present suit involves the running of D1 itself whereas the decision in the other suit requires D1 to submit an affidavit of the accounts by a certain date.

[3] Having decided thus the Court is required to consider the merits of the case at present. The evidence suggests there is a serious case to be tried in a situation where damages would not be an adequate remedy if the injuction is not granted. The balance of convenience lies in favour of P for the injunction to continue. The initial order made by this court is varied to enable D to submit the affidavits required by order of the other court whenever necessary.

[Application (prayer (i)) dismissed; Variation ordered as stated. Each party to bear own costs].

Cases listed at the end of the judgment as "Cases referred to by counsel:"

M.R.K. Nayar v. Ponnusamy & Ors. [1982] 2 MLJ 174
Cheah Theam Swee & Anor v. Overseas Union Bank Ltd .& Ors.[1989] 1 MLJ 426
Collings Hui Sdn Bhd v. United Estate Projects Bhd & Anor [1988] 3 MLJ 234
American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504
Mohamed Zainuddin bin Puteh v. Yap Chee Seng [1978] 1 MLJ 40
Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Osman & ors [1985] 2 MLJ 236
Lai Ah Kau & Anor v. Public Prosecutor [1988] 3 MLJ 391
Peter's Brickworks Sdn Bhd v. Lee Man Construction Co Sdn Bhd [1990] Mallal's Digest Yearbook 138
Yeap Mah Ee v. Kuan Kum Chiew & Anor [1988] 2 MLJ 389
Mohamed Said bin Ali & Ors v. Ka Wah Bank [1989] 3 MLJ 200
Professor Dr. A. Kahar Bador & Ors v. N. Krishnan & Ors [1983] 1 MLJ 407

For the plaintiffs - Shaiful Bahari Mahpar (Shakila Azariah with him); M/s. Azariah & Associates
For the defendants - Muhammad Shafee Abdullah (Adeline Goi Ai Ling with him); M/s Shafee & Co

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J: By summons in chambers filed exparte upon a certificate of urgency on 11 May 1993, the plaintiffs had prayed for several orders but their learned counsel had before me on the same date asked only for the order on the first prayer as they had wanted the other prayers to be heard interparte. I had accordingly granted, upon an undertaking for damages, the first prayer to restrain the first defendant, their officers, servants or their agents, namely the second defendant, from making any payment, signing cheques or in any other way dealing with any monies, assets or properties of the first defendant and carrying out his duties, functions and responsilities of the first defendant. The other prayers were accordingly fixed for an interparte hearing on 9 June 1993 but upon the urgent request of learned counsel for the defendants, for reasons which shall be discussed later, the hearing had been advanced to 26 May 1993. As the learned counsel for the plaintiffs were taken by surprise by the advanced hearing, they had asked for a short postponement to file their affidavit in reply and the matter was finally heard two days later on 28 May 1993.

At the outset, it was agreed that although the defendants had applied both to set aside the injunction and for striking out the plaintiffs' claim, the hearing was only to decide on the former. Learned counsel for the defendants had articulately argued mainly on the point of non-disclosure which would be sufficient in normal circumstances to grant the order to set aside without having to bother about the merits. He had reiterated that this case was connected with another case pending in another commercial court namely D1-22-316-93 where the first defendant here was the sole defendant and the plaintiff a company called Atlantic Chalstar. A decision had been made there on 28 April 1993 in favour of the defendant there to set aside the injunction granted on 31 March 1993 subject to the condition that the defendant there submit to the court the relevant accounts of the company within two weeks namely by 12 May 1993.

Learned counsel had further submitted that learned counsel for the plaintiffs here had appeared in that case originally to intervene for the plaintiffs here but had ended up merely holding a watching brief. He said that in the circumstances learned counsel for the plaintiffs would have been quite aware of the fact of the order made in the other case. He had also eloquently enunciated that the affidavit enclosing the relevant accounts in the other case had been affirmed by the second defendant on 11 May 1993 at 2 p.m. and he added that the injunction he was trying to set aside now had been applied for on the same date strongly implying that learned counsel for plaintiffs here were somehow trying to interfere with the sequence of events in the other case. Learned counsel for the defendants was of the view that if this court had been made aware of the other order, it would not have granted the application as it had the effect of making the order in the other case quite unworkable. However, it is pertinent to pause at this juncture and observe that the plaintiffs' application here had been filed at just past 9 a.m. on that day and was therefore well before the defendant in the other case had filed their affidavit and accounts in that other case at 2 p.m. This clearly showed that the submission of the accounts in that case was quite irrelevant to the application by the plaintiffs here as otherwise the plaintiffs here could have filed their application much earlier having known of the decision in the other case on 28 April 1993.

Learned counsel had also told the court that the order in the other case had been amended on 10 May 1993 and agreed that although there were, the other case was for breach of contract and the matter here is for breach of Director's duties, the common denominator was that they involved the receipt and utilisation of the first defendant's funds. He contended that the other case had taken care of all parties' interests including that of the plaintiffs here and the timing of the applications and the orders would show collusion between both plaintiffs in the two suits. At any rate, he maintained that there was no

urgency for the plaintiffs' exparte application and that there had been an abuse of court proceedings. He succinctly suggested that the injunction here was solely to sabotage and delay the extraction of timber by the defendant in the other case which licence was due to terminate on 31 May 1993 and which was the very reason why this application had to be heard before that date as some of the timber had not yet been removed after felling at which point the royalties had already become due. Finally, he had stated that the judge in the other case had held that the application to intervene by the plaintiffs here in that other case had nothing to do with the issues of setting aside the injunction there. It is relevant to note, as regards the last point, that the two matters certainly were not connected as far as the judge in the other case was concerned.

Learned counsel for the plaintiffs had informed the court, and his contention was in fact supported by the records in this case, that they were not aware of any amendments on 10 May 1993 to the order made on 28 April 1993 in the other case and that the accounts had to be submitted on a regular basis after the first submission by 12 May 1993. He had pertinently pointed out that the cause of action in the other case was between Atlantic Chalstar and the first defendant here, and it followed that the second defendant here and the plaintiffs here were not involved in the other case. As such, he was of the view that the order on 28 April 1993 did not and could not affect the second defendant here.Futher, he submitted that the two actions were distinct and the injunction in the other case had been set aside for non-disclosure of material facts. Learned counsel had also explained that if they had not applied for the injunction here exparte the way they did, the second defendant here would have had ample opportunity to meddle with the books and documents which would render any hearing on the merits quite meaningless.

He was also of the opinion that there was no urgency in this matter as the timber licence in the other case was renewable every three months and the relevant licence had in fact been renewed twice before. As for their involvement in the other case, learned counsel for the plaintiffs had explained that they had actually not been allowed to intervene and the relevant order in the other case had therefore not been served upon them. He concluded that even if the court were to hold that there had been any non-disclosure here as regards the decisions in the other case, it was purely innocent and not material.

On the next day, having carefully considered the arguments and affidavits, I had decided to dismiss the defendants' application and the full text of the self explanatory decision is reproduced here:

(i) this is an application to set aside the injunction ordered on 11 May 1993 against the defendants from doing certain acts in relation to the first defendant's affairs;

(ii) the main ground advanced by learned counsel for the defendants is that there had been material non-disclosure by the plaintiffs here in obtaining the said injunction exparte;

(iii) the fact not disclosed is the decision in Mahkamah Dagang 1 on 28 April 1993 in Civil Suit 22-316-93 where the court had set aside the injunction obtained there on 31 March 1993 but had ordered the defendant there, who is the first defendant here, to submit an affidavit by 12 May 1993 as to the details of the timber felled as regards the joint venture agreement between the parties there;

(iv) on the point of non-disclosure, this court had during the brief adjournment pending the decision perused the relevant affidavits and had discovered that the plaintiffs had in fact averred on the joint venture agreement, which is the subject matter of the other suit, in their affidavit supporting their application for the injunction here;

(v) their only failure was not disclosing the decision made in the case on 28 April 1993 although learned counsel for the plaintiffs was present holding a watching brief;

(vi) therefore the only question to be de-

cided now is whether that failure to disclose is material;

(vii) if it is, then this injunction should be set aside without any necessity to look into the merits;

(viii) if it is not, then the merits have to be considered;

(ix) in that light, it is pertinent to observe that the other suit concerns a joint venture agreement between the plaintiff there and the first defendant here for timber logging which contract is due to expire on 31 May 1993 which is the very reason for the urgency of this application to be heard before that date;

(xi) in the respect, this action is therefore wider in scope especially so when the joint venture agreement in the other suit is due to expire in two days' time;

(xii) as for the material non-disclosure, the proper test would be whether if the plaintiffs had stated the fact of the decision in the other suit on 28 April 1993 to this court, would this court have granted the order on 11 May 1993;

(xiii) in this regard, this court would say that it would not have made any difference as here it involves the running of the first defendant itself whereas the decision on 28 April 1993 in the other case only requires, after setting aside the injunction, the defendant there to submit an affidavit of the accounts by 12 May 1993;

(xiv) admittedly there has been a non-disclosure here but to this court, it is not a material non-disclosure;

(xv) it is therefore relevant for this court to reconsider the merits interparte;

(xvi) having reconsidered the facts on the matter and the relevant authorities, this court holds that there is a serious question to be tried, that damages would not be an adequate remedy and that the balance of convenience lies in favour of the plaintiffs here for the injunction to continue;

(xvii) however, to enable the first defendant here to comply with the decision of the 28th April 1993 in the other suit should the other court require further affidavits after the affidavits filed on the 12 May 1993 (although the records here do not substantiate this point), this court would vary its order made on the 11 May 1993 by adding at the end of the order the following -

> "melainkan untuk mengemukakan afidavit selanjutnya, jika diperlukan, untuk mengemukakan butir-butir yang dinyatakan di perenggan 3 dalam perintah yang dibuat dalam kes sivil D1-22-316-93;"

(xviii) in conclusion, the application at prayer (i) of enclosure 8 is dismissed but in these circumstances, the order of 11 May 1993 is varied as stated and each party is to bear their own costs for this application.